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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN C. VERNILE,
Petitioner,
vs.
PACIFICA FOUNDATION INC., a
California Nonprofit Public Benefit
Corporation,
Respondent.

PACIFICA FOUNDATION INC., a
California Nonprofit Public Benefit
Corporation,
Cross-Petitioner,
vs.
JOHN C. VERNILE,
Cross-Respondent.

Case No. 2:22-cv-02599-SVW-PVC

**PACIFICA FOUNDATION, INC.'S
RESPONSE TO PETITION TO
CONFIRM ARBITRATION AWARD
AND CROSS-PETITION TO
VACATE ARBITRATION AWARD**

[9 U.S.C. § 10]

Pursuant to the Federal Arbitration Act, Respondent/Cross-Petitioner Pacifica Foundation, Inc. (“Pacifica” or “Respondent”) by its undersigned counsel, hereby (a) opposes Petitioner/Cross-Respondent John C. Vernile’s (“Petitioner”) Petition to Confirm the April 18, 2022 Arbitration Award rendered by Arbitrator Dana Welch in favor of Petitioner and against Pacifica (the “Arbitration Award”), and (b) cross-petitions the Court for an order vacating the Arbitration Award.

NATURE OF THE PROCEEDINGS

This proceeding arises out of an arbitration (the “Arbitration”) conducted before Arbitrator Dana Welch (“Arbitrator Welch”) pursuant to an employment agreement (the “Agreement”) between Pacifica and Petitioner. In the Arbitration, Petitioner, asserted claims against Pacifica for wrongful termination and whistleblower retaliation. Petitioner claimed that mere months after being hired as Pacifica’s Interim Executive Director, he was terminated for vocalizing concerns about Pacifica’s business practices. Pacifica defended the Arbitration on the ground that Petitioner was fired for terminating all WBAI (Pacifica’s New York radio station) staff and taking WBAI’s programming off the air without proper approval from Pacifica’s Board of Directors (the “Board”).

During the Arbitration hearing before Arbitrator Welch, Pacifica presented evidence that Petitioner, who reports directly to the Board, fired¹ all WBAI staff, without the Board’s authorization and refused to take corrective action – despite being directed to by the Board – until ordered to do so by the New York Supreme Court. Thus, Arbitrator Welch properly determined that Petitioner’s termination was the direct result of his insubordination not his attempt to bring any of Pacifica’s business practices to light.

After the close of evidence, and upon the realization that Petitioner was not going to be successful on his wrongful termination causes of action, Petitioner

¹ Petitioner attempted to improperly classify the termination of the WBAI employees as “layoffs.”

1 attempted to present evidence regarding a purported defamation claim. Pacifica
2 objected to Petitioner being allowed to submit 14 hours of audio recordings that
3 were not authenticated or otherwise attached to any live testimony without
4 reopening the Arbitration hearing and being given the opportunity to present
5 evidence in defense of the new defamation claim.

6 Over the objections of Pacifica, Arbitrator Welch considered the recordings
7 as evidence only allowing Pacifica the opportunity to submit a short 10-page reply
8 brief in response. This misbehavior denied Pacifica the opportunity to present
9 relevant evidence and the opportunity to address how the defamation claims
10 abridged its free speech rights as protected by California's anti-SLAPP statute. By
11 doing so, Arbitrator Welch prejudiced Pacifica by directly compromising the
12 fairness of the Arbitration process. For that reason, Pacifica respectfully requests
13 that the Court vacate the Arbitration Award pursuant to section 10(a)(3) of the
14 Federal Arbitration Act (Title 9 of the U.S. Code), which empowers this Court to
15 vacate an arbitration award where the arbitrator refuses "to hear evidence pertinent
16 and material to the controversy" or engages in "any other misbehavior by which the
17 rights of any party may have been prejudiced." 9 U.S.C. § 10(a)(3). Moreover, the
18 manner in which Arbitrator Welch "calculated" Petitioner's assumed damages
19 based on her theory of defamation *per se*, without a scintilla of evidence relating to
20 Petitioner's harm purportedly caused by the defamation, strongly corroborates the
21 other evidence that Pacifica was denied basic due process.

22 The Arbitration Award should also be vacated pursuant to section 10(a)(4) of
23 the Federal Arbitration Act, which empowers courts to vacate an arbitral award that
24 rests on an exercise of power the arbitrator did not have. As shown below, the
25 alleged defamatory statements were made *after* Petitioner's termination and
26 therefore did not arise out of his employment with Pacifica. As Petitioner's
27 defamation claim fell outside of the scope of the Agreement's arbitration provision,
28 Arbitrator Welch lacked the authority to make any substantive ruling on this claim.

RESPONSE TO PETITION TO CONFIRM ARBITRATION AWARD

Pacifica answers the Petition, in accordance with the numbered paragraphs thereof. Pacifica denies all allegations in the Petition not specifically admitted herein and further responds as follows:

1. The allegations of Paragraph 1 are admitted.

2. The allegations of Paragraph 2 are admitted.

3. The allegations of Paragraph 3 are denied. The arbitration agreement (Petitioner's Exhibit A) states on page 7, Section 13(b): "The parties have to further agree that any action brought to enforce any rights or obligation under this Agreement shall be subject to the *exclusive jurisdiction* of the courts of the State of California" (emphasis supplied).

4. The allegations of Paragraph 4 are denied.

5. The allegations of Paragraph 5 are admitted.

6. The allegations of Paragraph 6 of the Petition are denied. The contract annexed as Exhibit A to the Petition is a "Draft Agreement." The full final agreement is compromised of Petitioner's Exhibit A, together with Petitioner's signed offer letter attached to Pacifica's Cross-Petition as Exhibit 1.

7. The allegations of Paragraph 7 are admitted to the extent that they quote some, but not all, of the arbitration language in the Draft Agreement. Respondent emphasizes that the arbitration clause in that agreement stated that "[i]n the unlikely event of a dispute between Pacifica and Employee *arising out of Employee employment and termination of employment*: Pacifica and Employee agree to submit dispute to final and binding arbitration." This clause did not include disputes which did not "arise out of Petitioner's employment, or arose after the termination of Petitioner's employment.

8. The allegations of Paragraph 8 are denied. Petitioner was terminated by unanimous vote of the Pacifica Board of Directors on November 14, 2019.

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1 9. Respondent denies the allegation of Paragraph 9 of the Petition to the
 2 extent that Petitioner commenced the arbitration process by submitting his formal
 3 demand for arbitration on November 15, 2019. A true and correct copy of
 4 Petitioner's November 15, 2019 arbitration demand, which states that Petitioner was
 5 *"protesting [his] termination as being in violation of the terms of my employment*
 6 *agreement and in violation of federal and California state laws,"* is attached to
 7 Pacifica's Cross-Petition as Exhibit 2. Petitioner did not raise any issue other than
 8 his termination in the November 15, 2019 demand letter. Petitioner appeared by
 9 counsel in connection with that arbitration on or about November 19, 2019, as set
 10 forth in Exhibit 3 to Pacifica's Cross-Petition. Subsequently, on May 27, 2020
 11 Petitioner's attorney, without notifying Pacifica, asked the American Arbitration
 12 Association to assist in designating an arbitrator and to administer the proceeding.
 13 Pacifica is informed and believes, and thereupon alleges, that the submission made
 14 on or about May 15, 2020, was not Petitioner's demand for arbitration.

15 10. The allegations of Paragraph 10 are admitted.

16 11. The allegations of Paragraph 11 are admitted.

17 12. Respondent denies the allegations of Paragraph 12 of the Petition in
 18 that the Award **denied** Petitioner relief on all claims related to his employment (he
 19 was found to have been terminated because he shut down a radio station owned by
 20 Respondent "in excess of his authority"), and not in violation of California's
 21 whistleblower statute. That Award did find that Petitioner was defamed in a radio
 22 program broadcast on December 20, 2019, subsequent to his termination, and
 23 awarded assumed damages based on a theory of defamation per se.

24 13. The allegations of Paragraph 13 are admitted.

25 **AFFIRMATIVE DEFENSES**

26 Respondent is informed and believes and based on such information and
 27 belief alleges the following separate and distinct affirmative defenses as to each
 28 any every request in the Petition:

FIRST AFFIRMATIVE DEFENSE

The Arbitrator lacked authority under the parties' arbitration agreement to address the issue of "defamation," since it did not "arise out of [Petitioner's] employment or the termination of his employment," and was not an issue reserved by the Parties for arbitration.

SECOND AFFIRMATIVE DEFENSE

The Award, to the extent it addresses defamation, as discussed in the Counter-Petition, was generated because the Arbitrator allowed evidence of "defamation," a claim which had been abandoned and not addressed in any testimony during the hearing, or in any documentary evidence introduced during the hearing, to be submitted post-hearing, without any opportunity to address that evidence with testimony or evidentiary analysis.

THIRD AFFIRMATIVE DEFENSE

The Arbitrator, as discussed in the Counter-Petition, exceeded her powers by issuing an award which waives the Respondent's unwaivable statutory rights and which contravenes an explicit legislative expression of public policy, to wit, Pacifica's right of free speech under the First Amendment to the US Constitution, and the California Constitution, and the protection of that right under California's anti-SLAPP laws, as expressed in the California Code of Civil Procedure Section 425.16.

FOURTH AFFIRMATIVE DEFENSE

The Petition should be dismissed because the Agreement's mandatory forum selection provision requires the Petition to have been brought in California Superior Court.

WHEREFORE, Pacifica respectfully requests that the Court enter an Order:

- 1) denying the Petition to Confirm the Arbitration Award;
- 2) vacating the Arbitration Award; and
- 3) granting all other such relief as the Court deems just and proper.

1 **CROSS-PETITION TO VACATE ARBITRATION AWARD**

2 As grounds for his Cross-Petition to Vacate Arbitration Award, Pacifica
3 alleges as follows:

4 **THE PARTIES**

5 1. Pacifica is a California Nonprofit Public Benefit Corporation, with its
6 main office located at 3729 Cahuenga Boulevard West, Los Angeles, California
7 91604.

8 2. Pacifica is informed and believes, and thereupon alleges, that
9 Petitioner/Cross-Respondent John C. Vernile is an adult individual who resides in
10 New York.

11 **JURISDICTION AND VENUE**

12 3. Pursuant to the Agreement's mandatory forum selection provision,
13 California Superior Court has exclusive jurisdiction over this matter. (Petition, Ex.
14 A, pg. 7.)

15 **FACTUAL BACKGROUND**

16 4. Pacifica was started by pacifists in 1946. In 1949, Pacifica's first radio
17 station, KPFA, was established in Berkeley, California. Over the years it acquired
18 four additional radio stations: (1) KPFK in Los Angeles, California, (2) KPFT in
19 Houston, Texas, (1) WBAI in New York City, and (4) WPFW in Washington, D.C.

20 5. Pacifica is run in accordance with its Bylaws and the California
21 Corporation Code.

22 **I. The Corporations Code and Powers of the Directors and the Board.**

23 6. Section 300 of the California Corporations Code states as follows:

24 Subject to the provisions of this division and any
25 limitations in the articles relating to action required to be
26 approved by the shareholders (Section 153) or by the
27 outstanding shares (Section 152), or by a less than
28 majority vote of a class or series of preferred shares
(Section 402.5), *the business and affairs of the
corporation shall be managed and all corporate powers*

shall be exercised by or under the direction of the board.

The board may delegate the management of the day-to-day operation of the business of the corporation to a management company or other person provided that the business and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.

Cal. Corp. Code § 300(a) (emphasis added).

7. Section 5151, further provides (in pertinent part) that:

[d]uring an emergency, the board may take any action that it determines to be necessary or appropriate to respond to the emergency, mitigate the effects of the emergency, or comply with lawful federal and state government orders, but shall not take any action that requires the vote of the members, unless the required vote of the members was obtained prior to the emergency.

Cal. Corp. Code § 5151(g)(2).

8. Section 5140 states, in pertinent part:

In anticipation of or during an emergency, the board may take any action that it determines to be necessary or appropriate to respond to the emergency, mitigate the effects of the emergency, or comply with lawful federal and state government orders, but shall not take any action that requires the vote of the members, unless the required vote of the members was obtained prior to the emergency.

Cal. Corp. Code § 5140(n)(3).

II. The Pacifica Bylaws.

9. The relevant sections of the Pacifica Bylaws are as follows:

a) Article Five, Board of Directors of the Foundation,
Section 1: Board of Directors – Eligibility, Number,
Powers and Duties

D. GENERAL POWER AND AUTHORITY

Subject to the provisions of the California Nonprofit Public Benefit Corporation law, and any limitations in the Articles of Incorporation and these Bylaws relating to action required or permitted to be taken or approved by the Members or Delegates of the Foundation, the activities and affairs of the Foundation shall be conducted and ***all corporate powers shall be exercised by or under the direction of the Board.***

E. SPECIFIC POWERS AND DUTIES

Without prejudice to the general power of the Board set forth above in Section 1D of this Article of these Bylaws, and subject to any limitations set forth in these Bylaws, the ongoing duties and powers of the board shall include, but not be limited to:

(1) Ensuring and facilitating fulfillment of the purposes of the Foundation as set forth in the Articles of Incorporation;

(2) Ensuring compliance with applicable state and federal laws;

(3) Ensuring the financial health of the Foundation by adopting and monitoring an annual budget and overseeing an independent annual audit of the Foundation's books and accounts;

(4) Ensuring regular communication with the Members;

(5) ***Appointing, supervising and discharging the Foundation's Executive Director, Chief Financial Officer and all Foundation officers, prescribing powers and duties for them as are consistent with the law and these Bylaws, and setting salaries and wages;***

(6) ***Overseeing the conduct, management and control of the Foundation's affairs and activities***, including the monitoring of the activities and actions of its radio stations and national staff consistent with applicable law and regulations, the Articles of Incorporation and these Bylaws;

b) Article Nine, Officers of the Foundation, Section 7: Executive Director

A. The President of the Foundation shall be referred to as the "Executive Director." The Executive Director shall be the general manager, chief executive officer and chief administrator of the Foundation. ***S/he shall be selected, supervised and discharged by the Board.*** In addition, his/her performance will also be subject to annual evaluation by each LSB, which may make recommendations to the Board.

B. ***Subject to the control of the Board***, the Executive Director shall have general supervision, direction and control of the business and the officers of the Foundation and the primary responsibility for implementing the directives, decisions and policies of the Foundation and the Board pertaining to administration, personnel, programming, financing and public relations. The Executive Director shall generally promote, coordinate and supervise the mission of the Foundation and shall have such powers and perform such duties as may be delegated or assigned to him/her by the Board.

and

c) Article Seven, Local Station Board, Section 3: Specific Powers and Duties

A. Each LSB, acting as a standing committee of the Foundation's Board of Directors, shall have the

1 following powers, duties and responsibilities
 2 related to its specific radio station, under the
 3 direction and supervision of the Foundation's
 4 Board of Directors:

5 B. To screen and select a pool of candidates for the
 6 position of General Manager of its respective
 7 radio station, *from which pool of approved*
 8 *candidates the Executive Director shall hire the*
 9 *station's General Manager.*

10 C. *Both the Executive Director and/or an LSB*
 11 *may initiate the process to fire a station*
 12 *General Manager.* However, to effectuate it,
 13 both the Executive Director and the LSB must
 14 agree to fire said General Manager. *If the*
 15 *Executive Director and the LSB cannot agree,*
 16 *the decision to terminate or retain said General*
 17 *Manager shall be made by the Board of*
 18 *Directors.*

19 10. Petitioner was employed as the third Interim Executive Director of
 20 Pacifica and started working in that role beginning August 2019. He made it clear
 21 when he was hired that he needed to continue with other work on the outside that he
 22 would return to when his six-month role at Pacifica ended, and he purposefully had
 23 language to that effect inserted into his contract.

24 11. Petitioner's employment contract with Pacifica included two
 25 documents, Plaintiff's Exhibit A (the Agreement") and Pacifica's Exhibit 1 (the
 26 employment offer letter executed by Petitioner). Both contained similar arbitration
 27 language. The relevant language reads: "[i]n the unlikely event of a dispute between
 28 Pacifica and Employee *arising out of Employee employment and termination of*
 29 *employment:* Pacifica and Employee agree to submit dispute to final and binding
 30 arbitration." (Petition, Ex. A, pg. 6; Cross-Petition, Ex. 1, pg. 2 (emphasis added).)
 31 This clause intentionally did not include disputes which did not "arise out of"
 32 Petitioner's employment or which arose after the termination of his employment.

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1 12. As indicated above, Pacifica had been in existence since 1946. It
2 expanded in around 1960 to include WBAI, a New York City station located at 99.5
3 on the FM dial. Periodically, over the years, either WBAI or one of the other
4 stations (especially KPFK in Los Angeles) experienced financial problems, (i.e.,
5 expenses exceeded income). Pacifica is one corporation, not an amalgam of
6 corporations, and excess expenditures at one station were, on occasion, covered by
7 money in the internal account of another station. Pacifica's bookkeeping included
8 accounts for each station, the Pacifica archives, and the Central Office, but, in the
9 end, it was one entity. On several occasions discussed during the Arbitration
10 hearing, stations had layoffs, approved by the Pacifica National Board: once at
11 WBAI, in or around 2013; and once at KPFK, in or around 2015.

12 13. Pacifica had a number of problems and disputes growing well before
13 Petitioner was hired. When he arrived, it had not filed its audit for 2016, 2017, and
14 2018, with either the California Attorney General or the IRS as an attachment to its
15 990 Tax Return. Because of poor bookkeeping it had lost its funding from the
16 Corporation for Public Broadcasting ("CPB"), a government entity, and owed CPB
17 money. The California Attorney General in 2016 had threatened to revoke
18 Pacifica's state tax-exempt status because at the time, its 2015 audit had not been
19 completed and filed. That problem was resolved in 2016 when the 2015 audit was
20 completed. Pacifica had a \$4 million judgment against it for unpaid rent at the
21 Empire State Building in New York, which was resolved through the procurement
22 of a \$3.7 million loan from an entity known as FJC in 2018.

23 14. One persistent "solution" to Pacifica's financial problems was a
24 proposal to sell WBAI's signal in New York City. Petitioner estimated in October
25 2019 that it was worth \$50 million. Unsurprisingly, that "solution" was not popular
26 with the staff or membership at WBAI.

27 15. Pacifica's structure is extremely democratic for a nonprofit corporation
28 of its size. Anyone who contributed \$25 in any given year is a member of the station

1 they contribute to. Members of a station elect delegates to a Local Station Board
2 (“LSB”). Each station’s LSB is then responsible for electing four listener members
3 and one “staff” member to serve on the National Board. This system allows each of
4 the five stations to have equal representation on the National Board. The National
5 Board also included two Directors from affiliate stations – stations which carry
6 programming from Pacifica-owned stations in exchange for a small fee.

7 16. As illustrated above, the Pacifica Bylaws, as well as the Corporations
8 Code, gave ultimate power to the National Board. The Bylaws expressly gave the
9 Board power to hire and fire the Executive Director and the power to hire and fire a
10 station General Manager if the Local Station Board and an Executive Director did
11 not agree about whether to fire a General Manager.

12 17. This structure, where each station had an equal number of Directors,
13 and where stations with better finances were covering costs for stations with
14 financial issues, led to a fractious Board – a situation that, in the end, Petitioner
15 drove to its extreme.

16 18. Among the group of Pacifica leaders who supported the sale of WBAI
17 was Bill Crosier (“Crosier”), who served as Pacifica’s Interim Executive Director in
18 2017. Not only did Crosier outline WBAI’s sale as a possible solution, he was a
19 proponent of taking Pacifica into bankruptcy so it could more easily sell its
20 property. Simply stated, Crosier was staunchly opposed to Pacifica’s governance
21 structure; on the day that he and Petitioner showed up at WBAI in New York City
22 to fire the staff and take all local programming off the air, Crosier filed a lawsuit in
23 Alameda County Superior Court asking a judge to impose a new set of Bylaws on
24 Pacifica.

25 19. Crosier, who was Pacifica Board Secretary when Petitioner was hired,
26 Grace Aaron, who was the Board Chair, and Sabrina Jacobs, who was Vice Chair,
27 were set forth in Petitioner’s contract as his “Transition Team.” Neither the National
28

1 Board nor the Bylaws themselves gave this Transition Team authority to act in the
2 stead of the Board.

3 20. According to KPFA (the Berkely-Bay Area station) General Manager
4 Quincy McCoy (“McCoy”), he met with Petitioner and Grace Aaron in Berkeley.²
5 At that meeting, approximately two weeks into his term as Interim Executive
6 Director, Petitioner announced that he wanted to create a Sirius XM station called
7 Pacifica Across America, and that *he* had “decided to run WBAI that way until it
8 stabilized financially.” Clearly, he had gone into his job with a plan—a plan which
9 eight weeks later he implemented, without permission from the National Board or
10 even discussing the proposal with the Board.

11 21. On September 30, 2019, Petitioner issued an internal memo (dated
12 September 25, 2019) warning that the financial situation of WBAI was so bad that
13 Pacifica was on the verge of imminent collapse.³ Not once in that memo did
14 Petitioner talk about firing the WBAI General Manager (something he had no
15 power to do himself), about firing staff, or about implementing his Pacifica Across
16 America solution, thereby replacing all local programming in New York.

17 22. During the Arbitration hearing, which will be discussed in greater
18 detail below, documents showed that Petitioner discussed his plans for WBAI with
19 Pacifica’s General Counsel, Ford Greene (“Greene”), who advised Petitioner that it
20 was imperative, under the law, that he get the National Board to approve his WBAI
21 plan. Greene added that at minimum, he should at least poll the Board to ascertain
22 its support – despite the Bylaws having no provision for polling the Board.

23
24
25 ² Noteworthy, McCoy testified at the Arbitration hearing that KPFA had never been
asked to transfer money to benefit WBAI but had done so for KPFA payroll needs.

26 ³ In fact, as it turned out, even when Petitioner cut off on-air fundraising at WBAI
27 between October 7 and November 8, 2019, WBAI met all of its payroll obligations
28 during that period. Contrary to Petitioner’s beliefs, Pacifica did not collapse – not
even during the Pandemic.

1 23. Petitioner had Crosier poll the Board – but only the members that he
2 thought would be supportive of Petitioner’s plans. Instead of sending out a proposal
3 to the entire membership of the National Board for discussion, Crosier sent e-mails
4 to one or two Board members at a time, requesting their support. Although Crosier
5 never received approval by the National Board’s majority, he and Petitioner decided
6 to nonetheless march forward with the plan to shut down local programming at
7 WBAI and fire⁴ its entire staff.

8 24. On October 7, 2019, the same day that Crosier filed an *ex parte*
9 injunction request with Alameda County Superior Court to restructure Pacifica’s
10 governance, he and Petitioner, and a few others, showed up in New York to shut
11 WBAI down. All but one member of the staff (Linda Perry) was asked to leave.
12 The program feed was changed to Pacifica Across America, the General Manager
13 and all paid staff were “terminated,” the union was told that all union staff were
14 “terminated,” and all volunteer staff (about 150 producers) were told that they too
15 were being fired.

16 25. That evening the WBAI LSB Chair, and a number of members, filed
17 suit and were able to have an emergency motion for a temporary restraining order
18 (“TRO”) heard by New York State Supreme Court Judge Frank Nervo. The TRO
19 was granted, directing that all staff be put back on payroll and that WBAI be put
20 back on the air, and its studio returned to the NYC staff. On October 10, 2019, the
21 New York Appellate Division modified the TRO and required only that the staff be
22 kept on payroll.

23 26. Given New York’s overwhelming community support for Pacifica and
24 WBAI, Petitioner’s action prompted a reaction in the press. The New York Mayor,
25 Bill de Blasio, tweeted about the loss of the station, and Brooklyn Borough
26
27

28 ⁴ Not lay off.

1 President Eric Adams (now New York's active Mayor) led a rally on the steps of
2 City Hall denouncing Petitioner's actions.

3 27. A month of full-scale litigation in the New York court system
4 followed. Eventually the case was assigned to New York State Supreme Court
5 Justice Melissa Crane, who, on November 6, 2019, issued a Preliminary Injunction
6 ordering Pacifica to restore WBAI to the status it held before October 7, 2019. A
7 true and correct copy of Judge Crane's order and the transcript from the November
8 6, 2020 hearing is attached hereto as Exhibit 4.

9 28. While the New York litigation was pending, the Pacifica National
10 Board held a series of meetings. One of them was a Special Meeting conducted on
11 October 20, 2019. A majority of the Board attended, and they again voted,
12 *unanimously*, to order Petitioner to reverse what he had done at WBAI, and to
13 restore local control over WBAI's programing. It also voted to suspend Petitioner.
14 See Cross-Petition, Ex. 5, pg. 10. Petitioner ignored this express direction from the
15 National Board, continued to hold himself out as Pacifica's Interim Executive
16 Director, and continued to air Pacifica Across America on WBAI.⁵

17 29. In her November 7, 2019 ruling, Judge Crane found that the October
18 20, 2019 Board meeting was properly called. Given the vote from the November 7th
19 Board meeting, Judge Crane reinstated the original TRO, issued October 7, 2019,
20 requiring local control over programming, reinstatement of all employees and staff,
21 and non-interference with WBAI's operations by Pacifica. The station went back on
22 the air the next day.

23 30. The National Board, at its following meeting on November 14, 2019,
24 voted to terminate Petitioner's employment.

25
26 ⁵ Contrary to Pacifica's Bylaws and Petitioner's employment Agreement, Petitioner
27 believed that the National Board reported to and took direction *from him* – not the
28 other way around. Petitioner's continued insolence is what ultimately led to his
termination.

1 31. On November 15, 2019, Petitioner demanded arbitration. A true and
 2 correct copy of Petitioner's November 15, 2019 demand for arbitration is attached
 3 hereto as Exhibit 2. It reads, in relevant part, "I am protesting my termination as
 4 being in violation of the terms of my employment agreement and in violation of
 5 federal and California state laws. Pursuant to the terms of my employment contract
 6 I am invoking/requesting arbitration with the American Arbitration Association in
 7 the state of California." See Ex. 2.

8 32. On November 16, 2019, the Acting Chair of the Pacifica Board,
 9 Lawrence Reyes, sent an Amended Notice of Termination to Petitioner, which
 10 stated:

11 On November 14, 2019, at a duly constituted meeting of
 12 the Pacifica National Board, a determination was made to
 13 terminate your employment as Interim Executive Director,
 for cause.

14 The grounds include, but are not limited to, willful
 15 disregard of Pacifica policies and procedures, deliberate
 16 refusal to follow the instructions of the PNB, and an effort
 17 to undermine the democratic processes of Pacifica. The
 18 charges arise out of your actions in connection with
 19 WBAI between the dates of October 7, 2019 and
 20 November 7, 2019, and the conduct of LSB elections in
 21 October 2019. The Board, during that period, repeatedly
 22 adopted resolutions asserting that your actions involving
 23 WBAI were inappropriate, and directed that they be
 24 reversed. You did not follow those instructions until you
 25 were ordered to do so by NY Supreme Court Justice
 26 Melissa Crane on November 6, 2019. You took your
 actions without consulting the PNB, and did so in the
 midst of a WBAI Fund Drive, causing Pacifica to lose
 hundreds of thousands of dollars. In addition, you sought,
 unsuccessfully, to prevent the election apparatus of
 Pacifica from completing LSB elections in October and
 November 2019.

27 ///

28 ///

1 33. On November 19, 2019 an attorney, Arthur Lazear, advised that he was
2 appearing in litigation concerning Petitioner Vernile's "employment."

3 34. Pacifica heard nothing more until May 15 2020, when Lazear, *ex parte*,
4 filed an "Arbitration Demand" with the American Arbitration Association ("AAA")
5 asking to begin the arbitrator selection process. He did not serve a copy on Pacifica,
6 which learned of the filing more than a month later.

7 **III. The Arbitration of Petitioner's Wrongful Termination Claims.**

8 35. On September 11, 2020 Diane Welch ("Arbitrator Welch") was
9 appointed by AAA to act as the arbitrator in the parties' employment dispute.

10 36. On June 28, 2021, Arbitrator Welch issued a scheduling order setting a
11 hearing for December 13-17, 2021, and requiring pre-hearing briefs to be filed by
12 December 2, 2021.

13 37. Petitioner's attorney submitted his Pre-Hearing Brief on December 2,
14 2021. A true and correct copy of Petitioner's Pre-Hearing Brief is attached hereto
15 as Exhibit 6. At no point in the 22-page brief did Petitioner's counsel mention the
16 word "defamation." In its conclusion Petitioner only asked for "damages he
17 suffered from his wrongful termination." There was no request for or reference to
18 damages from any purported defamation.

19 38. The Arbitration hearing was held December 13-17, 2021, and
20 continued to January 12 and 25, 2022. At no point during the lengthy Arbitration
21 hearing was any testimony or documentary evidence admitted into evidence to
22 prove Petitioner's defamation claim. As a consequence, Pacifica had no obligation
23 to call its own witnesses or introduce any evidence to refute a defamation claim that
24 had not been presented by Petitioner.

25 39. At the conclusion of the hearing, Arbitrator Welch asked the parties
26 whether they wanted to add any documentary evidence that had not been introduced
27 through witnesses at the hearing. Petitioner's attorney, recognizing that the
28 Arbitration process was not going in Petitioner's favor, listed 9 audio files with

multiple recordings made as late as December 2020. Pacifica, through counsel, objected, especially after Petitioner's counsel stated that the recordings were being submitted to "prove defamation." A true and correct copy of Pacifica's memo to Arbitrator Welch's outlining Pacifica's objections is attached hereto as Exhibit 7. Pacifica had no opportunity to address the alleged defamation through witnesses, or examine Petitioner or his own witnesses about the statements themselves, the elements Petitioner needed to establish in order to prove his defamation claim or Pacifica's affirmative defenses thereto.

40. Arbitrator Welch nonetheless allowed the tapes into evidence, requiring Petitioner to "identify which statements he alleges were defamatory and identify the specific recording and time stamp of the alleged defamatory statement." Her only concession to Pacifica was to allow a rebuttal brief but did not otherwise provide Pacifica the opportunity to present evidence in response to Petitioner's defamation claim that was shoehorned into the Arbitration process after the close of evidence.

41. Again, Pacifica strenuously objected to the patently unfair process adopted by Arbitrator Welch. See Ex. 8. Pacifica's counsel pointed out that Arbitrator Welch's refusal to reopen the hearing and allow Petitioner and Pacifica to present evidence on the defamation claim would result in extreme prejudice to Pacifica and jeopardize the entire Arbitration process. Id.

42. As Pacifica feared, Petitioner's defamation claim was presented in the broadest of strokes. Counsel provided a link to the middle of some broadcasts, all of which post-dated Petitioner's termination and Arbitration demand, and (Pacifica has to assume) invited the Arbitrator to listen to everything which followed. There was not even an effort to give a segment notation, such as "between 1:02:45 and 1:04:02," which would ask the Arbitrator to listen to a 1 minute and 17 second segment. There was no specific quote or statement which the Arbitrator was directed to look for. There was no indication as to who was speaking on the

1 recordings (or whether they were speaking on behalf of Pacifica) or who was
2 offering the statement (which, as discussed below, is in all instances a statement of
3 opinion on a matter of general public interest). Petitioner’s submission after the
4 Arbitration hearing amounted to simply an invitation to the Arbitrator to listen to
5 approximately 14 hours of recordings and find a “defamatory statement” herself.

6 43. In the Arbitration Award, which Petitioner seeks to confirm, Arbitrator
7 Welch found that Petitioner’s failed to prove his claims for either wrongful
8 termination or whistleblower retaliation. More specifically, Arbitrator Welch held
9 that Pacifica had “met its burden of establishing by clear and convincing evidence
10 that it terminated [Petitioner]’s employment because the PNB believed that he had
11 exceeded his authority by discharging WBAI staff and shutting down its
12 programming without full PNB approval, and that further, that he exceeded his
13 authority by not reversing that decision until ordered to do so by Justice Crane.”
14 (Petition, Ex. C, pg. 30-31.) Pacifica does not contest this portion of Arbitrator
15 Welch’s findings.

16 44. However, Arbitrator Welch then turned to Petitioner’s defamation
17 claim. She found that in a December 20, 2019 broadcast – over a month after
18 Petitioner’s termination and his corresponding demand for arbitration – Linda Perry,
19 WBAI’s program director “broadcast that [Petitioner] was hired to carry out a plan
20 to sell WBAI for ‘millions and millions of dollars to benefit other stations’ and that
21 he was part of a ‘rogue group’ who had staged a ‘coup.’” (Petition, Ex. C, pg. 34-
22 35.) Arbitrator Welch continued that “Perry stated that the plan had been ‘in the
23 works for a long time,’ to dump WBAI.” (*Id.*) The Arbitrator then found that the
24 statements were “demonstrably false.” Arbitrator Welch appeared incredibly
25 offended by the word “coup” even though she specifically found that Petitioner
26 acted in excess of his authority and that although Petitioner and the others who
27 closed WBAI and fired its staff on October 7, 2019 “did not represent the majority
28 of the PNB, they did represent a *significant minority*.” (*Id.* at pg. 36.) Arbitrator

1 Welch even found that it was “defamatory” to state that Petitioner was discussing
 2 the sale of WBAI, even though the record contained an e-mail from Petitioner on
 3 the very subject, sent during the period of time he had taken local WBAI
 4 programming off the air. (See Ex. 9.)

5 45. Setting aside the due process and fairness concerns discussed in greater
 6 detail below, Arbitrator Welch’s findings that the use of the words “rogue group”
 7 and “coup” was demonstrably false and that individuals falsely stated that Petitioner
 8 was discussing the sale of WBAI, were inconsistent with the evidence actually
 9 presented during the hearing and the remainder of Arbitrator Welch’s own findings.

10 46. Arbitrator Welch additionally found that although Petitioner was a
 11 “limited-purpose public figure,” and thus had to prove by “clear and convincing
 12 evidence” that *Pacifica* acted with reckless disregard for the statements’ truth or
 13 falsity, Petitioner had satisfied this steep burden without offering one word of
 14 testimony. (Petition, Ex. C, pg. 37.) Arbitrator Welch held that Petitioner showed
 15 “by clear and convincing evidence that Perry, along with other supporters of
 16 WBAI...were colossally hostile towards [Petitioner],” proved by the assertion that
 17 “[Petitioner] was denounced in public [by an unnamed person] and called ‘vermin,’
 18 ‘rat,’ and ‘crook.’” (*Id.*) And that in “this environment, it is no wonder that Perry
 19 [and others] did not investigate claims they made on air to determine their truth or
 20 falsity.”

21 47. Arbitrator Welch found that the recordings presented after the
 22 Arbitration hearing contained statements that were defamatory per se.
 23 Consequently, she held that “damage to Vernile’s reputation is conclusively
 24 presumed” and that “[p]roof of actual damages is not required.” (*Id.* at pg. 38.)
 25 Arbitrator Welch concluded by rhetorically asking “who would want to hire
 26 someone who acted as a ‘rogue’ and ‘staged a coup.’” Perry’s sue of the words
 27 “coup” and “rogue,” Arbitrator Welch held (as opposed to the lawful firing), caused
 28 Petitioner Vernile \$300,000 in *assumed* damages.

THE ARBITRATION AWARD SHOULD BE VACATED

I. INTRODUCTION.

Pacifica requests that the Court vacate the Arbitration Award pursuant to the Federal Arbitration Act the California Arbitration Act.

II. LEGAL STANDARD FOR VACATING ARBITRATION AWARDS.

48. Section 10 of the Federal Arbitration Act (the “FAA” or the “Act”), to the extent it is even applicable given the Agreement’s mandatory California forum-selection and choice-of-law provisions (Petition, Ex. A, pg. 7), provides that arbitration awards may be vacated on the following grounds:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)-(4). The Arbitration Award at issue, to the extent that it addressed Petitioner’s “defamation” claim, should be vacated under sections 10(a)(3) and (4).

49. Similarly, a trial court may vacate an arbitration award under California Code of Civil Procedure section 1286.2. Section 1286.2(a) allows a trial court to vacate an arbitration award if it determines: the rights of a party were substantially prejudiced by misconduct of a neutral arbitrator (§ 1286.2(a)(3)); the arbitrator exceeded his or her powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted (§ 1286.2(4));

1 or, the rights of a party were substantially prejudiced by the refusal of the arbitrator
 2 to postpone the hearing upon sufficient cause being shown or by the refusal of the
 3 arbitrator to hear evidence material to the controversy (§ 1286.2(a)(5)).

4 **III. THE ARBITRATION AWARD MUST BE VACATED.**

5 **50. As discussed in greater detail below, Arbitrator Welch exceeded**
 6 **her authority.** Though the Agreement's arbitration provision only applied to
 7 disputes between Pacifica and Petitioner arising out of Petitioner's employment and
 8 termination of employment, Arbitrator Welch entertained evidence and issued an
 9 award based on alleged defamation that took place *after* Petitioner's termination.

10 **51. In addition, Arbitrator Welch committed misconduct and injected**
 11 **unfairness into the arbitration proceeding by allowing Petitioner – *after the***
 12 ***arbitration hearing had ended* – to submit evidence at the eleventh hour relating**
 13 **to alleged defamatory statements that were never discussed in Petitioner's pre-**
 14 **arbitration demand or pre-hearing brief.** As a result of the Arbitrator's decision,
 15 Pacifica was prejudiced in multiple ways.

16 **52.** First, by considering the defamation claim in the context of an ad hoc,
 17 post-arbitration hearing proceeding after all law and motion matters had already
 18 been briefed and ruled on, Pacifica was precluded from vindicating its free speech
 19 rights under California's anti-SLAPP statute.

20 **53.** Second, Arbitrator Welch's process for making substantive findings on
 21 Petitioner's defamation claim was unfair because his claim was not (1) included in
 22 Petitioner's initial demand for arbitration, which laid out the claims Petitioner
 23 sought to arbitrate; (2) discussed in Petitioner's pre-hearing brief, which framed the
 24 issues to be tried through the arbitration process (thereby essentially waiving this
 25 claim); and (3) addressed through witnesses during the hearing or documents
 26 introduced during the hearing.

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54. Third, Arbitrator Welch acted improperly by not permitting the record to be reopened once she ruled that the audio files could be introduced to “prove” defamation after the testimony had closed.

55. Finally, Arbitrator Welch exhibited a manifest disregard for the law by issuing an award based on defamation *per se* without first finding that the speaker actually had a high degree of awareness of probable falsity.

A. Arbitrator Welch Exceed Her Powers By Considering a Defamation Claim that Fell Outside the Scope of the Arbitration Agreement.

56. Under both California Law and the FAA, arbitrators may not issue an unauthorized remedy or grant an award on an unsubmitted issue. 9 U.S.C. § 10(a)(3); see also Cal. Code of Civ. P. § 1286.2(4). The California Supreme Court has delineated the standard for measuring the scope of the arbitrator’s authority in Advanced Micro Devices, Inc. v. Intel Corp. In that case the California Supreme Court confirmed that “the deference due an arbitrator’s decision on the merits of the controversy requires a court to refrain from substituting its judgment for the arbitrator’s in determining the contractual scope of those powers.” Advanced Micro Devices, Inc. v. Intel Corp., 9 Cal. 4th 362, 372 (1994). The court noted, however, “that the deference accorded an arbitrator’s decision under the arbitration agreement is not unrestricted, and indeed, *is limited by the agreement to arbitrate*” and recognized that courts “retain the authority to overturn arbitration awards as beyond the arbitrator’s powers, whether for an unauthorized remedy or decision on an *unsubmitted issue*.” Id. at 375.

57. Additionally, “Arbitrators may exceed their powers by issuing an award that violates a party’s unwaivable statutory rights or that contravenes an explicit legislative expression of public policy.” Richey v. AutoNation, Inc., 60 Cal. 4th 909, 916 (2015); see also Board of Education v. Round Valley Teachers Assn., 13 Cal. 4th 269, 272-277 (1996) (holding that arbitrator exceeded powers by giving

effect to collective bargaining provisions that violated statutory rights in the California Education Code); see also California Dept. of Human Resources v. Service Employees Internat. Union, Local 1000, 209 Cal.App.4th 1420 (2012) (holding that arbitrator lacked power to make an award that violated explicit public policy favoring legislative oversight of state employee contracts when he interpreted a memorandum of understanding between union and state to require salary increases the Legislature did not approve).

58. In light of these principles, it is evident that an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory or Constitutional rights. Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 100–101 (2000).

59. Here, Arbitrator Welch considered an issue outside the scope of the Agreement’s arbitration provision and deprived Pacifica of statutory and Constitutional protections. Namely, the arbitration clause here limited the claims which were subject to arbitration to those claims *arising out of Employee employment and termination of employment*. (Petition, Ex. A, pg. 6; Cross-Petition, Ex. 1, pg. 2 (emphasis added).) Despite this limitation, Arbitrator Welch considered a defamation claim involving activity that took place *after* Petitioner was terminated. Additionally, this claim was not addressed in pre-hearing briefs or in testimony before the arbitrator. Based on the forging, Arbitrator Welch lacked the authority to render a substantive finding of defamation *per se* and, consequently, the Arbitration Award should be vacated.

B. Arbitrator Welch’s Procedures as to the Defamation Claim Resulted in an Inherently Unfair Arbitration.

60. The Legislature has authorized “judicial review in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process.” Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 8-13 (1992); see also Cal. Code of Civ. P. § 1286.2(a); see also 9 U.S.C. § 10(a)(3). “[T]o hold that

1 a district court may not review any procedural rulings of the arbitration
 2 panel...would result in judicial abdication in reviewing arbitration awards.
 3 Although the Arbitration Act and the California Code of Civil Procedure requires
 4 restraint in reviewing arbitration awards, it does not call for total abdication of
 5 reviewing power.” Newark Morning Ledger Co. v. Newark Typographical Union
 6 Local 103, 797 F. 2d 162, 165–66 n. 3 (3d Cir.1986) (quoting Summers, *Judicial*
 7 *Review of Labor Arbitration*, 2 Buffalo L.Rev. 1, 21–22, 24 (1952)). “Thus, a
 8 district court may consider procedural irregularities insofar as they rise to the level
 9 of requiring vacatur or modification of the award pursuant to sections 10 and 11 of
 10 the Arbitration Act. To hold otherwise would not serve the purposes of the Act.”
 11 Carte Blanche (Singapore) Pte. Ltd. v. Carte Blanche Intern., Ltd., 683 F. Supp.
 12 945, 956 (S.D.N.Y. 1988).

13 1) By allowing the Petitioner to litigate the defamation claim at the
 14 eleventh hour, Pacifica was denied the opportunity to present
 15 counter-evidence.

16 Assuming, *arguendo*, that Arbitrator Welch did not exceed her authority, and
 17 the Arbitration provision in the Agreement, by considering Petitioner’s defamation
 18 claim, the process she implemented to do so violated Pacifica’s due process rights
 19 and was patently unfair. As indicated above, Arbitrator Welch admitted 14 hours of
 20 audio tape into evidence – after the close of evidence and over the objection of
 21 Pacifica. Only permitting Pacifica to submit legal argument in a reply brief, without
 22 the opportunity to present evidence in response to Petitioner’s defamation claim,
 23 was prejudicial to Pacifica. It was imperative that Arbitrator Welch reopen the
 24 record for testimony about the statements contained within the recordings and allow
 25 Pacifica the opportunity to explore the “defamatory” statements, many of which
 26 Arbitrator Welch ultimately concluded were unactionable opinion, as the right to
 27 fundamental due process would have required.

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2) By allowing the petitioner to litigate the defamation claim at the eleventh hours, after law and motion practice had ended, Pacifica was denied the opportunity to utilize the protections of California's anti-SLAPP statute.

a. California's anti-SLAPP Statute Standard.

61. The right to free speech is an inviolable right set forth in the US and California Constitutions. In California, and many other states, "anti-SLAPP" statutes have been enacted to not only to protect speech, but to penalize those who use litigation to attack the exercise of free speech, particularly speech on a matter of public interest express in the media.

62. In California, "[T]he only thing the defendant needs to establish to invoke the [potential] protection of the SLAPP statute is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of her right of petition or free speech. From that fact the court may [effectively] presume the purpose of the action was to chill the defendant's exercise of First Amendment rights." Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 61 (2002); see also Cal. Code of Civ. P. § 425.16.

63. California Code of Civil Procedure section 425.16 provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. Code of Civ. P. § 425.16(b)(1).

64. The purpose of the statute is to encourage participation in matters of public significance by allowing a court to promptly dismiss unmeritorious actions or claims brought to chill another's valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. See Cal. Code of Civ. P. § 425.16(a).

1 65. The California anti-SLAPP law allows a defendant to file a motion to
2 strike the complaint, which the court will hear within 30 days unless the docket is
3 overbooked. Cal. Civ. Proc. Code § 425.16(f). Discovery activities are placed on
4 hold from the time the motion is filed until the court has ruled on it, although the
5 judge may permit “specified discovery” if the requesting party provides notice of its
6 request to the other side and can show good cause for it. Cal. Code of Civ. P. §
7 425.16(g). Thus, section 425.16 provides an expedited mechanism for addressing
8 defamation claims at the beginning of a lawsuit so that claims involving protected
9 speech may be stricken without the need for unnecessary litigation and discovery.

10 66. Court’s implement a two-step process for determining whether a claim
11 is subject to being stricken under the anti-SLAPP statute. In the first step, the
12 defendant bringing an anti-SLAPP motion must make a *prima facie* showing that
13 the plaintiff’s suit is subject to section 425.16 by showing the defendant’s
14 challenged acts were taken in furtherance of his or her constitutional rights of
15 petition or free speech in connection with a public issue, as defined by the statute.
16 Jarrow Formulas, Inc. v. LaMarche, 31 Cal. 4th 728, 733 (2003).

17 67. After the defendant satisfies the first step, the burden shifts to the
18 plaintiff to demonstrate there is a reasonable probability he or she will prevail on
19 the merits at trial. Cal. Code of Civ. P. § 425.16(b)(1). In this phase, the plaintiff
20 must show both that the claim is legally sufficient and there is admissible evidence
21 that, if credited, would be sufficient to sustain a favorable judgment Wilcox v.
22 Superior Court, 27 Cal.App.4th 809, 823 (1994), disapproved on other grounds in
23 Equilon Enterprises, supra, 29 Cal.4th at 68 n. 5. In making this assessment, the
24 court must consider both the legal sufficiency of and evidentiary support for the
25 pleaded claims, and must also examine whether there are any constitutional or
26 nonconstitutional defenses to the pleaded claims and, if so, whether there is
27 evidence to negate any such defenses. Traditional Cat Assn., Inc. v. Gilbreath, 118
28 Cal.App.4th 392, 398–399 (2004).

68. In considering whether a plaintiff has met those evidentiary burdens, the court must consider the pleadings and the evidence submitted by the parties. Cal. Code of Civ. P. § 425.16(b)(1)-(2). The court cannot weigh the evidence (Looney v. Superior Court, 16 Cal.App.4th 521, 537–538 (1993)), but instead must simply determine whether the plaintiff’s evidence would, if credited, be sufficient to meet the burden of proof. Wilcox, supra, 27 Cal.App.4th at 823–825 (standard for assessing evidence is analogous to standard applicable to motions for nonsuit or directed verdict.).

69. In Hecimovich v. Encinal School Parent Teacher Organization, 203 Cal.App.4th 450 (2012), the court held when deciding whether the anti-SLAPP statute applies to a defamation claim, an “issue of public interest must be construed broadly.” Because Petitioner’s defamation claim relied entirely on statements broadcast on a radio station about an issue of public concern, California’s anti-SLAPP law needed (and here needs to be) considered.

70. The California anti-SLAPP law allows a defendant to file a motion to strike the complaint, which the court will hear within 30 days unless the docket is overbooked. Cal. Civ. Proc. Code § 425.16(f). Discovery activities are placed on hold from the time the motion is filed until the court has ruled on it, although the judge may permit “specified discovery” if the requesting party provides notice of its request to the other side and can show good cause for it. § 425.16(g).

b. Pacifica was not afforded the protections of 425.16.

71. Here, because of the timing of Petitioner’s submission of his defamation claim, and the patently unfair arbitration process implemented by Arbitrator Welch for considering the claim, Pacifica was denied the opportunity to utilize the protections of California’s anti-SLAPP statute.

72. Specifically, Petitioner submitted to Arbitrator Welch 14 hours of radio broadcasts that contained discussions of what had occurred at WBAI. In the broadcasts, hosts and guests (including Eric Adams, now the Mayor of NYC)

1 discussed the events surrounding WBAI in October 2019, and expressed their
 2 views, arguments and opinions. Petitioner invited the Arbitrator to parse those
 3 recordings, for expressions of opinion which he characterized as inaccurate, and
 4 asked for damages. Petitioner did not present testimony, explain why they the
 5 statements were inaccurate, that the statements were made on behalf of Pacifica, or
 6 even describe the context in which the statements were made.

7 73. Even if Respondent Pacifica had any idea what Petitioner was going to
 8 engineer after the close of testimony, it could still not utilize the protections of
 9 California's anti-SLAPP process in the contest of the arbitration. Had Pacifica had
 10 the opportunity to pursue anti-SLAPP relief, it had a strong likelihood of success.

11 74. Petitioner's late asserted defamation claim, to the extent it could be
 12 made out from the audio files, involved an issue of public interest. There was no
 13 testimony, from either side, which would allow a proper assessment of
 14 Constitutional malice – Petitioner was a public figure. Not only was there no
 15 testimony about what statements were being targeted, there was also no context, no
 16 who said what, and no explanation for why Pacifica should be liable for what
 17 people said at on a radio show.

18 **C. The Arbitration Award Was Made in Manifest Disregard of the** 19 **Law.**

20 75. Under the FAA, absent circumstances indicating that the arbitration
 21 process was tainted by fraud, corruption, or arbitrator misconduct, a federal court
 22 may also vacate arbitration awards “made ‘in manifest disregard of the
 23 law.’” Merrill Lynch, Pierce, Fenner & Smith v. Jaros, 70 F. 3d 418, 421 (6th Cir.
 24 195) (quoting Wilko v. Swan, 346 U.S. 427 (1953)).” A mere error in interpretation
 25 or application of the law is insufficient. Id.; see also Siegel v. Titan Indus.
 26 Corp., 779 F. 2d 891, 892–93 (2d Cir. 1985); I/S Stavborg v. National Metal
 27 Converters, Inc., 500 F. 2d 424, 432 (2d Cir. 1974). An arbitration panel acts in
 28 manifest disregard of the law if the applicable legal principle is clear and well

1 settled and it refuses to follow that legal principle. Glennon v. Dean Witter
 2 Reynolds, Inc., 83 F. 3d 132, 136 (6th Cir. 1996); see also Wilko v. Swan, 346 U.S.
 3 427, 436–37 (1953).

4 76. The Glennon case contains a telling description of how this perspective
 5 is applied. In Glennon, the Sixth Circuit was reviewing the defendant’s challenge to
 6 an arbitration panel’s punitive damage award. The court noted that:

7 In this case, defendant does not argue that if there
 8 is *any* evidence to support the compensatory damage award or
 9 if there is *any* evidence to support a finding of malice, that the
 10 punitive damage award is excessive. Rather, defendant argues
 11 that because the record contains *no* evidence to support
 12 an award of compensatory damages and *no* evidence of
 “intentional, fraudulent, malicious, or reckless conduct,” there
 is no basis for an award of punitive damages.

13 Glennon, at 138-139. The court concluded that:

14 For purposes of this discussion we assume without deciding
 15 that due process protections attach in this case, and therefore,
 16 proceed to consider whether the FAA affords meaningful
 17 review to defendant’s claim that *no* evidence supports the
 18 arbitration panel’s punitive damage award. We conclude that
 19 the manifest disregard of the law standard permits vacatur of
 20 those punitive damage awards that are supported
 21 by *no* evidence. Since that standard of review would allow
 vacatur of those awards, it is necessarily meaningful review of
 claims that *no* evidence supports an arbitration panel’s punitive
 damage award.

22 Id.

23 1) No evidence was presented to support a \$300,000 award.

24 77. There was *no evidence* supporting the award of \$300,000. Arbitrator
 25 Welch made a finding of defamation *per se* so that Petitioner would not be required
 26 to present evidence of actual damages. Given the Arbitration Award, it appears that
 27 Arbitrator Welch picked the \$300,000 figure out of the air, similar to the way she
 28 made the finding of “actual malice” simply because Linda Perry *sounded angry*.

1 Based on the forgoing, even if Arbitrator Welch had the authority to make a finding
 2 on Petitioner's defamation claim, the process she implemented was so patently
 3 unfair such that the interests of justice mandate vacating the Arbitration Award.

4 2) No evidence was presented showing malice.

5 78. A claim for defamation requires proof of a false and unprivileged
 6 publication that exposes the plaintiff "to hatred, contempt, ridicule, or obloquy, or
 7 which causes him to be shunned or avoided, or which has a tendency to injure him
 8 in his occupation." Cal. Civ. Code § 45.

9 79. "The sine qua non of recovery for defamation ... is the existence of
 10 falsehood." Letter Carriers v. Austin, 418 U.S. 264, 283 (1974). Because the
 11 statement must contain a provable falsehood, courts distinguish between statements
 12 of fact and statements of opinion for purposes of defamation liability. Although
 13 statements of fact may be actionable as libel, statements of opinion are
 14 constitutionally protected. Baker v. Los Angeles Herald Examiner, 42 Cal.3d 254,
 15 260 (1986).

16 80. A statement is defamatory when it tends "directly to injure [a person]
 17 in respect to his office, profession, trade or business, either by imputing to him
 18 general disqualification in those respects which the office or other occupation
 19 peculiarly requires, or by imputing something with reference to his office, trade,
 20 profession, or business that has a natural tendency to lessen its profits[.]" Cal. Civ.
 21 Code § 46(3).

22 81. Statements that contain such a charge directly, and without the need for
 23 explanatory matter, are libelous *per se*. Cal. Civ. Code § 45a. A statement can also
 24 be libelous *per se* if it contains a charge by implication from the language employed
 25 by the speaker and a listener could understand the defamatory meaning without the
 26 necessity of knowing extrinsic explanatory matter. MacLeod v. Tribune Publishing
 27 Co., 52 Cal. 2d 536, 548–550 (1959). However, if the listener would not recognize
 28 the defamatory meaning without "knowledge of specific facts and circumstances,

1 extrinsic to the publication, which are not matters of common knowledge rationally
 2 attributable to all reasonable persons,” the matter is deemed defamatory *per quod*
 3 and requires pleading and proof of special damages. Barnes–Hind v. Superior
 4 Court, 181 Cal.App.3d 377, 387 (1986).

5 82. A threshold determination in a defamation action is whether the
 6 plaintiff is a “public figure.” The courts have defined two classes of public figures.
 7 “The first is the ‘all purpose’ public figure who has ‘achiev[ed] such pervasive fame
 8 or notoriety that he becomes a public figure for all purposes and in all contexts.’”
 9 Reader’s Digest Assn. v. Superior Court, 37 Cal. 3d 244, 253–254 (1984) (citing
 10 Gertz v. Robert Welch, Inc. 418 U.S. 323, 351 (1974)). “The second category is
 11 that of the ‘limited purpose’ or ‘vortex’ public figure, an individual who
 12 ‘voluntarily injects himself or is drawn into a particular public controversy and
 13 thereby becomes a public figure for a limited range of issues.’” Id. The California
 14 Supreme Court went on to state that “unlike the ‘all purpose’ public figure, the
 15 ‘limited purpose’ public figure loses certain protection for his [or her] reputation
 16 only to the extent that the allegedly defamatory communication relates to his role
 17 [or her] in a public controversy.” Id.

18 83. When the plaintiff is a public figure, he or she may not recover
 19 defamation damages merely by showing the defamatory statement was false.
 20 Instead, the plaintiff must also show the speaker made the objectionable statement
 21 with malice in its constitutional sense, “that is, with knowledge that it was false or
 22 with reckless disregard of whether it was false or not.” Reader’s Digest Assn., 37
 23 Cal. 3d at 256.

24 84. The test is “a subjective test, under which the defendant’s actual belief
 25 concerning the truthfulness of the publication is the crucial issue.” Reader’s Digest
 26 Assn., 37 Cal. 3d at 257. “This test directs attention to the ‘defendant’s attitude
 27 toward the truth or falsity of the material published...[not] the defendant’s attitude
 28

1 toward the plaintiff.” Reader’s Digest Assn., 37 Cal. 3d at 257 (quoting Widener
 2 v. Pacific Gas & Electric Co., 75 Cal.App.3d 415, 434 (1977)).

3 85. The reckless disregard test is not a negligence test measured by
 4 whether a reasonably prudent person would have published, or would have
 5 investigated before publishing, the defamatory statement. St. Amant v. Thompson,
 6 390 U.S. 727, 731 (1968). Instead, the evidence must “permit the conclusion that
 7 the defendant actually had a ‘high degree of awareness of...probable falsity.’”
 8 Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 688 (1989) (internal
 9 citations omitted). “As a result, failure to investigate before publishing, even when
 10 a reasonably prudent person would have done so, is not sufficient to establish
 11 reckless disregard.” Id.

12 86. Instead, to support a finding of actual malice, the failure to investigate
 13 must fairly be characterized as demonstrating the speaker purposefully avoided the
 14 truth or deliberately decided not to acquire knowledge of facts that might confirm
 15 the probable falsity of charges. Antonovich v. Superior Court, 234 Cal.App.3d
 16 1041, 1049 (1991). The requisite malice must be shown by clear and convincing
 17 evidence. This standard requires that the evidence of actual knowledge of the falsity
 18 or reckless disregard for its falsity must be of such a character “as to command the
 19 unhesitating assent of every reasonable mind.” Rosenauro v. Scherer, 88 Cal.App.4th
 20 260, 274 (2001).

21 87. Here, Arbitrator Welch ultimately found that Petitioner’s actions at
 22 WBAI to be “in excess of his authority,” but his efforts to further the views of a
 23 significant minority on the Pacifica Board, did not amount to a “coup.” Arbitrator
 24 Welch didn’t see the word “coup” as an expression of opinion, but one of fact, and
 25 she found the actual malice required by State and Federal Law to have been
 26 established simply because the speaker was “angry.” Such a finding was made in
 27 manifest disregard for the law and necessitates vacating the Arbitration Award.

28 ///

CONCLUSION AND PRAYER FOR RELIEF

Respondent/Cross-Petitioner Pacifica Foundation, Inc. respectfully requests that this Court deny the Petition to Confirm Arbitration Award, grant Respondent's Cross-Petition to Vacate Arbitration Award, and award Respondent such other and further relief as this Court may deem proper.

Dated: May 20, 2022

FOR PURPOSE LAW GROUP

By: /s/ Matthew B. Learned

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Dated: May 20, 2022

**ADVOCATES FOR JUSTICE,
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By: /s/ Arthur Z. Schwartz

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